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IN THE
Supreme Court of the United States

October Term 1985

P. CHARLES SCHWENDER,

Petitioner,

vs.

DEPARTMENT OF LABOR,

Respondent.

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is submitted on behalf of petitioner to address respondent's argument (at page 5 of brief for the respondent in opposition) that due process does not require that the deciding official be someone other than the official who proposed the employee's removal.

POINT I

THE GOVERNMENT'S RELIANCE ON DeSARNO v. DEPARTMENT OF COMMERCE IS MISPLACED AND ITS INTERPRETATION OF ARNETT v. KENNEDY IS ERRONEOUS

Respondent's citation of *DeSarno v. Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), discloses a fundamental misunderstanding of the basis for petitioner's claim that his due process rights were violated by the Agency's pretermination procedures. The holding in *DeSarno* was, simply, that "[a]t the pretermination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person." *Id.* 761 F.2d at 660. This is clearly a different situation from that confronting petitioner at the pretermination stage herein.

In *DeSarno,* although the deciding official had indeed "proposed" the charges — at least in the sense of having them drafted and served — he had not been an eyewitness to any of the material occurrences underlying the charges, as had Roger Clark in this case. He had not conducted any of the investigative work to gather evidence in support of the charges, as had Clark; as far as the Court of Appeals' opinion shows, he had not had any conversations with the accused employees which later formed the basis for several of the charges against them, as had Clark; and, most importantly, his credibility was not placed directly in issue by the accused employees in their defense to the charges, as was Clark's in this case.

In *DeSarno,* the initial investigation of the accused

employees had been conducted by their second line supervisor, while the chief witness against them was a co-employee. The deciding official, who also personally received their oral reply, had played neither of these roles at the pretermination stage. There was, therefore, no reason for the Court of Appeals to assume that he had a compelling personal interest in the outcome of the proposed removal. Unlike Roger Clark, the deciding official in *DeSarno* faced no challenges to his competence, credibility, or integrity in the course of receiving the employees' oral reply or in weighing the merits of the charges.

Perhaps it is accurate to say, as the Court of Appeals observed in *DeSarno*, that "[t]he law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case." 761 F.2d at 660, *supra*. Here, however, it was hardly possible for petitioner even to get his side of the story *heard* by the deciding official (other than through petitioner's written responses) — much less to get him to change his mind — since the Agency had interposed petitioner's adversary, Roger Clark, as the oral reply officer between petitioner and the deciding official. The view of the evidence received by the deciding official was Clark's; the credibility recommendations made to the deciding official were Clark's; and the omissions in the evidence presented to the deciding official were Clark's — omissions which, it is fair to assume, influenced the deciding official's decision to remove petitioner from the Federal service.

At the Merit Systems Protection Board hearing, John B. Miles, the Agency's deciding official, was asked

whether his assessment of petitioner's credibility might have been different, had certain matters raised in the charges been explained to his satisfaction. One of them, for example, was whether petitioner had told Roger Clark, during Clark's investigative interview with petitioner on January 27, 1981, that he had been suffering from dental pain on December 12, 1980, thus explaining why his timecard for that date showed eight hours of sick leave. Clark had maintained, in the specifications supporting the charges, that petitioner told him he should have taken annual leave that day (A-50, A-103)*. Petitioner challenged Clark's recollection on this point, however, maintaining in his oral and written replies that he had explained to Clark at the investigative interview why he had taken sick leave on December 12, 1980, i.e., because of his dental pain (A-66; A-84; A-87; A-113).

Yet, despite petitioner's repeated emphasis on this credibility issue, at the Merit Systems Protection Board hearing Clark could not recall whether he had ever discussed with Miles, the deciding official, petitioner's statements to Clark on January 27, 1981 about his dental pain (A-133). Ironically — and tragically, as it turned out for petitioner — Clark admitted at the Merit Systems Protection Board hearing that petitioner had indeed mentioned his dental pain during the investigative interview:

> A. You know, he did tell me about his teeth. He did say that he had thought about having a dentist appointment ***. Because, I said "You left the impression that you had a dentist appointment, possibly, and then you

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* Numbers in parenthesis preceded by an "A" refer to pages of the Appendix previously submitted to the Court with the Petition.

come back with eight hours sick leave for Friday." (B-1)*.

On cross-examination, Clark's recollection of petitioner's remarks was even clearer:

A. As a result of me asking why his amended time card showed him being on sick leave status on Friday; he simply volunteered that while he was thinking about going to the dentist or thought he might have a dental appointment and thought he might be there; then he continued to go and say that he had been having some problems with his teeth and some such.

Q. In the adverse action, Mr. Clark, you said that Mr. Schwender said that he was having trouble with his teeth, not dental. Do you recall whether pain in his teeth or dental appointment?

A. He may have said either one or both. I mean, we talked about it several different times.

Q. Is an employee allowed to take sick leave for dental appointment?

A. Yes.

Q. Is an employee allowed to take sick leave if he has dental pain, discomfort?

A. Yes. (B-2-3).

At the Merit Systems Protection Board hearing, Miles admitted that, had he known of Clark's recollection of this conversation, his determination of petition-

* Numbers in parenthesis preceded by a "B" refer to excerpts from the transcript of November 17, 1984 hearing before Joseph K. Riotto, Presiding Official, Merit Systems Protection Board. These excerpts are appended to this reply brief. Other pertinent excerpts from that hearing are part of the Appendix previously submitted to the Court with the Petition.

er's credibility vis-a-vis Clark's might have been different (B-5). Thus, had Clark been less concerned with his own credibility before Miles, and more concerned with making an impartial recommendation to him on the merits of the charges, the deciding official's disposition of this adverse action might well have been different.

Respondent is also mistaken in arguing that the opinions of five Justices in *Arnett v. Kennedy*, 416 U.S. 134 (1974) dispose of petitioner's due process claims. The plurality opinion, by Justice Rehnquist, did not reach the issue of the impartiality of the decision maker "in its constitutional dimension," 416 U.S. at 155-156, n.21, but held simply that the removal statute did not require the decision maker to be someone other than the proposing official. Such a holding clearly does not vitiate petitioner's due process claims in this case, since, unlike *Arnett*, they do not rest on any statutory basis but are directly presented in their constitutional dimensions. Justice Powell's opinion in *Arnett* held that due process is satisfied so long as "an impartial decision maker is provided at the post-removal hearing where the employee's claims are finally resolved," 416 U.S. at 170, n.5. However, the critical question to be decided in this case, in light of *Cleveland Board of Education v. Loudermill*, ____ U.S. ____ , 105 S.Ct. 1487 (March 19, 1985), is whether due process requires an impartial decision maker — or, at least, a prohibition on *ex parte* contacts with the decision maker by the employee's adversary — *prior* to his removal from the Federal service.

CONCLUSION

For the reasons cited in the petition, as well as the foregoing, this Court should grant the writ of certiorari to review the constitutionality of the Agency's pretermination procedures herein.

Respectfully submitted,

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APPENDIX

was his sister or not. I did, certainly, see him with a woman. It's certainly one of the world's most popular sightseeing places. Certainly, what he said relative to being sightseeing with his sister coincided with what I had seen on Thursday. You know, he did tell me about his teeth. He did say that he had thought about having a dentist appointment because I related to him, at the same time, my discussion with Pat Joos and the discussion that she said that she had with him that previous Monday, the week before that, you know, the previous Monday, December 5th, I believe that was, a week prior. I'm sorry, the previous, previous Friday; December 5th is on a Friday. Because, I said "You left the impression that you had a dentist appointment, possibly, and then you come back with eight hours sick leave for Friday."

Q. Did he say he made a mistake on the amended time card?

A. No, he did not.

Q. Did he say the timekeeper made a mistake on the amended time card?

A. No, he did not.

Q. All right. At that time did you give

meeting, okay, and I asked him then, when he told me that he returned from that meeting on Friday, I asked him what was his status on Thursday and Friday.

Q. Did he tell you what time he left New York on Friday?

A. I don't recall specifically other than it was in the afternoon sometime.

Q. And then you said you asked him what his status was?

A. That's correct.

Q. He said he should have been on annual leave both days?

A. That's correct, he said he was on annual leave both days.

Q. But you also told us that he then discussed a dental appointment and dental problems that he was having, is that correct?

A. That is after I, you know —

Q. In the same conversation?

A. That's correct.

Q. Same conversation; how did that come up?

A. As a result of me asking why his amended time card showed him being on sick leave status on Friday; he simply volunteered that while he was

thinking about going to the dentist or thought he might have a dental appointment and thought he might be there; then he continued to go and say that he had been having problems with his teeth and some such.

Q. In the adverse action, Mr. Clark you said Mr. Schwender said that he was having trouble with his teeth, not dental. Do you recall whether pain in his teeth or dental appointment?

A. He may have said either one or both. I mean, we talked about it several different times.

Q. Is an employee allowed to take sick leave for dental appointment?

A. Yes.

Q. Is an employee allowed to take sick leave if he has dental pain, discomfort?

A. Yes.

Q. And in fact you knew from looking at the original time cards, Mr. Schwender had taken some sick leave the week before; am I correct?

A. You mean the original one submitted?

Q. Yes?

A. I don't recall of seeing the original time card submitted, no.

Q. You told us you showed Mr. Schwender a copy?

and disbelieving Mr. Schwender?

A. I think that was the main thing, and then we had a statement from both, you know, and a conflict in the evidence.

Q. On this same page, Mr. Miles, you indicate you believed Mr. Clark when Mr. Clark told you that nothing was said with respect to a dental problem. Do you see that there?

A. You want to point that out?

Q. This is page five.

A. Again — sorry.

MR. RIOTTO: Well, while he is reviewing that, do you mind if I — let's go off the record.

(Discussion off the record.)

MR. RIOTTO: Back on the record.

THE WITNESS: Where are you talking about on that page?

BY MR. PUTRINO:

Q. Also reference, Mr. Miles, to the answer on page six, that same paragraph.

A. That nothing was mentioned in the discussion on January 27th with Mr. Clark about having dental problems or having pain and discomfort that day, on the day he came.

Q. Have you ever learned that Mr. Clark realized there was such a discussion —

MS. CRONAN: I object to Counsel characterizing in a hypothetical question.

MR. RIOTTO: It is a hypothetical question.

MS. CRONAN: As to facts not in evidence.

Mr. PUTRINO: It is a hypothetical only pending reading the transcript later.

BY MR. PUTRINO:

Q. If you were to learn in fact that Mr. Clark later on, or Mr. Clark suddenly recalled such a conversation of a dental problem, January 27th; would that change your mind?

A. I think that puts weight, again, on the credibility question.

Q. You do realize that Miss Joos' statement, which you choose to believe, referred to a dental appointment?

A. Yes, I think he said on the previous week that he had a dental appointment, and in Albany on the following Friday.

Q. December 12th, that we are talking about?

A. Yes.

Q. And that, again, begins to become consistent?